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How to think about PPMs (and climate change)

DONALD H. REGAN¹

I. Introduction

The European Commission has apparently backed off from a proposal to tax imported goods produced by methods that generate excessive greenhouse gas emissions.² So the issue of whether such a tax would be legal under the WTO has become slightly less urgent than it recently appeared. But Pascal Lamy the Director-General of the WTO still thought the possibility of some countries imposing emission-based trade restrictions was worth mentioning prominently in his speech to the Trade Ministers Conference in conjunction with the Bali Conference on climate change after Kyoto.³ And at that same conference, an official of the European Commission may have indicated that such restrictions are not off the table entirely.⁴ Clearly, the impetus for such a tax to be levied by some nation or other is not going to go away until we have a universally accepted international regime for emissions control — which is to say, not any time soon.

Of course, as Lamy notes, there are all sorts of reasons to prefer a multilateral solution to the climate problem. Unilateral import restrictions based on emissions will be deeply resented by exporting countries. Unilateral restrictions are also likely to disrupt the economy of the importing country, if its supply chains and production have been globalised. Unilateral restrictions cannot in any event fully address the problem of high-emissions production when the products are sold in

¹ William W. Bishop, Jr. Collegiate Professor of Law and Professor of Philosophy, University of Michigan. I thank Ted Parson for discussion of a draft, and my commentators Jacques Bourgeois and Daniel Crosby.

² A. Bounds, 'EU turns away from carbon tax on imports', *Financial Times*, 26 November 2007.

³ From the WTO website, www.wto.org/english/news_e/sppl_e/sppl83_e.htm

⁴ ICTSD, 'Trade ministers discuss links between commerce and climate change in Bali', *Bridges Weekly Trade News Digest* 11, No. 43 (2007).

third-country markets (or in the home market of the high-emissions exporting country itself). Nor can they fully address the problem of investment capital flowing to high-emission countries. But it is one thing to say that we would prefer a universal or widespread international agreement. It is quite another to reach such an agreement. Until we do, unilateral action will have its proponents.

It might be suggested that no country will impose emissions-related import restrictions, for the same reasons that the EU never used more than a fraction of its authorisation for US\$ 4 billion of trade sanctions against the US after it prevailed in the *FSC (United States — Tax Treatment for Foreign Sales Corporations)* litigation.⁵ This may be too sanguine; the cases are different in important respects. If we ask why the EU did not impose the authorised sanctions, a number of reasons come to mind. (1) Doing so would have greatly embarrassed general political and economic relations between the EU and the US. (2) There would have been great disruption to EU producers because of the interdependence of global production. (3) From a national welfare point of view, sanctions, which are just protective tariffs under a special permission, would hurt the EU economy overall more than they would help it, even aside from the disruption issues. Finally, (4) there was no group of EU producers certain to benefit from sanctions. In one way, of course, the possibility of sanctions was an invitation to any and every producer group that wanted a protective tariff to ask for one. But no group could be confident that effort spent lobbying would pay off, partly because no group had anything resembling a claim of right to protection.

If we now compare sanctions to an emissions-related import restriction, we see a number of differences. (1) The embarrassment to general political and economic relations with affected exporting countries may be much the same — no difference there. (2) With regard to disruptions to supply chains, however, there is a difference. There will of course be disruptions resulting from the import restriction, possibly substantial ones, but by hypothesis, the importing country had already decided to confront precisely such disruptions when it adopted its restrictions on domestic production (at least, if the import restriction takes the form of a tax). (3) There is also a difference with regard to the overall harm to the

⁵ J. Bhagwati and P. Mavroidis, 'Is action against US exports for failure to sign Kyoto Protocol WTO-legal?', *World Trade Review* 6 (2007), 299–310, argue against the EU imposing such restrictions, and they introduce their discussion with the *FSC* sanctions analogy.

economy. The sanction/tariff creates no benefit except to domestic producers and the treasury; in the conventional understanding, these benefits are outweighed by the loss to consumers (or other users) of the product. In contrast, the emissions-based import restriction creates a distinct benefit in the form of reduced worldwide emissions. Whether or not the import restriction induces the exporter to change its production methods, it will (normally) reduce the demand for goods made with high-emission processes; it will thus reduce the intensity of use of such processes and the total damage done by them. The emissions-based import restriction might still be 'irrational' for the importing country in the sense that the extra cost to it of producing goods with the low-emissions process (or of buying only goods produced with the low-emissions process) is less than the benefit that accrues *to it* from the reduced use of the high-emissions process, since the benefit of that reduced use is spread over the whole world. But still, that sort of irrationality — which from another perspective is mere global good citizenship — is something the importing country had already committed itself to when it decided to limit its *own* use of the high-emissions process in advance of comparable commitments by other countries. Finally, (4) in the case of the emissions-based import restriction, there is a particular producer group that can expect to benefit, and they have a very plausible claim of right to protection from imports produced using high-emission processes. This will affect both their motivation to lobby and the motivation of the political system to respond to their lobbying. There will also be another important lobby in favour of the restrictions, namely environmentalists, who play a role that has no analogue in the case of sanctions.

In connection with this last point, it is unfortunate (although not unusual) that when Lamy discusses emissions-based import restrictions in his Bali speech, he speaks as if the only possible justification for such restrictions is offsetting the competitive disadvantage to domestic producers caused by the domestic measures. If this were really the only thing to be said in favour of the restrictions (that they offset competitive disadvantage), they would be nothing more than protectionism — which is more or less the impression Lamy conveys. But as we have seen, there is something else to be said in favour of the restrictions: they can be expected to reduce the global emissions of greenhouse gases. This not only constitutes an additional, non-protectionist justification, it also changes the way we should view the 'offsetting competitive disadvantage' justification. As I shall explain in section III, when there is the

appropriate sort of non-protectionist justification for the restriction, then offsetting the competitive disadvantage to domestic producers is desirable; indeed it is *necessary* if we are to achieve efficient location of production by the operation of comparative advantage.

If we suppose that it is at least possible that some country might want to impose emissions-based import restrictions, the next question is whether there is any legal problem with this under the WTO. Some might argue that the Appellate Body settled the legal issues in *US — Shrimp*.⁶ But surely that is too quick. The Appellate Body has made it clear that, unless they change their mind, process-based trade restrictions are not flatly forbidden across the board. One such has been definitively upheld. But the decision in *Shrimp* attracted vehement criticism from many WTO Members and many scholars, and it continues to do so.⁷ Although I think the Appellate Body was right both as a matter of treaty interpretation and as a matter of theory and policy, and I hope they will stick to their guns, I can also imagine them looking for ways to back away from *Shrimp* to some extent. There is no shortage of serious questions to be confronted. (1) Can we say, for example, that the capacity of the atmosphere to absorb CO₂ without serious damage to the climate is an 'exhaustible natural resource'? (2) If not, are the particular measures being challenged 'necessary' to the protection of human, animal, or plant life or health? (3) Are the precise discriminations between which products are admitted and which are not admitted 'justifiable' in the sense required by the chapeau of Article XX of the GATT (which *Shrimp I* makes clear is a requirement with teeth)? All of these questions presuppose that we have got to Article XX, where the burden of proof is on the respondent (importing) country. Given the practical difficulties of definition and administration that will attend any emissions-based import restriction,⁸ the importing country would like to avoid that

⁶ *United States — Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5)*, WT/DS58/AB/RW (adopted 21 November 2001).

⁷ As to the members' reaction, see C. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (Washington DC: AEI Press, 2001), pp. 48–50, p. 128. For an example of the scholarly criticism, see J. Bhagwati, *In Defense of Globalization* (Oxford University Press, 2004), pp. 153–8.

⁸ Examples of the difficulties include: (1) defining the carbon emissions attributable to particular foreign products; (2) accounting for the fact that emissions permits have often been given away in the domestic system; (3) deciding how to treat products that have high carbon footprints because they come from countries that have chosen to meet their reduction commitments (under a Kyoto Protocol-style national emission-reduction target) in different ways from the importing country.

burden of proof, and it can do so if it can persuade the Appellate Body that its restriction is a permitted border tax adjustment under Article II.2(a), or that it falls under, and is consistent with, Article III as expanded by the interpretive Note *Ad III*. What are the prospects for that? Or, what if the challenge is under the Technical Barriers to Trade Agreement (TBT), where the issues are least restrictiveness and appropriateness to the local situation, and there is no textual analogue of Article XX at all? For that matter, does the TBT address unincorporated process-based restrictions?

It is clear, then, that there are many important legal issues concerning emissions-based import restrictions that are still unsettled. But there are a number of other excellent articles that discuss these legal issues in detail,⁹ and for the most part I do not propose to go over the legal terrain again. Instead, I want to talk about how we should think about 'PPMs', including emissions-based import restrictions, in general. Because the legal issues are so uncertain, people's views about them are inevitably influenced by their underlying prejudices and pre-dispositions concerning PPMs. The Border Tax Adjustment provisions in particular seem to function as a Rorschach blot for revealing people's pre-dispositions. Unfortunately, these pre-dispositions are often based on confused thinking.

Many intelligent, thoughtful, well-informed people make claims about the economics and the political morality of PPMs that are muddled or just wrong. For example, I think many people are confused about the relationship between PPMs and comparative advantage. It is often said that PPMs interfere with the operation of comparative advantage. The truth is that sometimes PPMs are essential if comparative advantage, properly understood, is to have its proper influence. There is also confusion about when precisely one country's behaviour (or its producers' behaviour) creates an 'externality' vis-à-vis other countries. This confusion, coupled with another about whether PPMs are necessarily aimed at getting exporting countries to change their policies, makes PPMs appear 'coercive' even when they do not deserve to be regarded that way. My hope is that I can dispel some confusion, and that clearer thinking about the general nature of PPMs will lead to better legal decisions.

⁹ e.g. R. Howse and A. Eliason, 'Domestic and international strategies to address climate change: an overview of the WTO legal issues', in this volume; J. Pauwelyn, 'US Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law', Working Paper NI WP 07-02, Nicholas Institute for Environmental Policy Solutions, Duke University (April 2007); P. Demaret and R. Stewardson, 'Border Tax Adjustments under GATT and EC law and general implications for environmental taxes', *Journal of World Trade* 28 (1994), 5-65.

II. What is a PPM?

The initials 'PPM' refer to 'process or production method'. On its face, the concept has nothing to do with trade restrictions of any kind. But 'PPM' is also now routinely used to refer to trade restrictions that are somehow based on the use or non-use by producers of particular processes or production methods. This broader usage is ambiguous in an important way. I suspect that for most people the paradigm PPM is a restriction that says, for example, 'we will not allow the import of widgets from any country that permits the use of certain processes or production methods for producing widgets'. This I shall refer to as a 'country-based' PPM. A different sort of PPM, however, is one that says 'we will not allow the import of widgets that were themselves produced using certain processes or production methods'. This I shall refer to as a 'product-based' PPM. The difference, of course, is that under the product-based PPM, widgets that are produced by approved techniques may be imported even if they come from a country that also permits the use of disapproved techniques.¹⁰

In what follows, 'PPMs' should be taken to refer only to *product-based* PPMs unless I specifically say otherwise. (I am also discussing only what are known as 'unincorporated PPMs' — restrictions based on processes or production methods that leave no distinctive trace in the physical constitution of the product when it arrives in the importing country. PPMs focusing on processes that do affect the physical constitution of the product are simply not controversial in the way unincorporated PPMs are.) The possible justifications for product-based and country-based PPMs differ in a number of ways, some of which I shall come back to later. But for now, let me suggest a 'moral' difference between the two sorts of PPM. To begin, forget about PPMs for a moment. I take it we think there is a significant difference between an importing country saying, (1) 'We do not want that product because of what it is in itself (an unsafe toy, a car without a catalytic converter, an item of Nazi memorabilia)', and the same country saying, (2) 'We do not want that (otherwise innocent) product because it comes from you (the particular

¹⁰ A third possibility is a 'producer-based' PPM, one that says 'we will not allow the import of widgets from any producer that uses certain processes or production methods for producing widgets (for any part of its production, not just the particular widgets we are importing)'. Although this is the category in which we would have to classify Corporate Average Fuel Economy (CAFE) standards, a bit awkwardly, I shall simplify the discussion in the text by ignoring this possibility.

exporting country).’ Even if the exporting country is singled out by some general description of its behaviour (e.g. ‘no widgets from countries that allow capital punishment’), the exclusion of innocent products because of the country they come from seems especially problematic. I do not mean to say it is never appropriate or allowable; just that it seems fundamentally more problematic than the exclusion of products that are objectionable in themselves. This antipathy towards country-based exclusion is one of the reasons for the intuitive appeal of the most-favoured-nation principle.¹¹

Accepting the intuitive appeal of making some distinction between the two sorts of restriction I have mentioned, let us now reintroduce PPMs; and specifically, let us ask which of the two sorts of restriction the different kinds of PPM seem most akin to. The country-based PPM is obviously akin to (2), the restriction that says, ‘We do not want that (otherwise innocent) product because it comes from you.’ Indeed, it is straightforwardly an instance of (2), with the disfavoured countries singled out because they permit certain production techniques. The product-based PPM is not straightforwardly an instance of either (1) or (2), but to my mind, is much more like (1) than (2). It does not exclude any product because of its country of origin. Rather it excludes a product only because of the way *that product* was produced. With the example of climate change before us, it is clear that there can be good reasons to care about how a product was produced — reasons every bit as compelling as the reasons to want safe toys, or to exclude Nazi memorabilia, and so on. Of course, product-based PPMs can be abused for covert protectionist purposes; but so can product regulations that focus on the intrinsic physical properties of the products. If the question is about the general ‘moral’ status of a category of regulation, it seems clear to me that product-based PPMs are no more problematic in their general form than ordinary product regulations; and they are a world apart from country-based PPMs.¹² This discussion is intended only to make it

¹¹ In fact, I think there are deep questions about the ideal contours and justification (in terms of economics, political economy, and political morality) of the most-favoured-nation principle that I have never seen properly addressed — but this is not the place for that discussion.

¹² In some cases, of course, the country-based PPM (or a producer-based PPM, see n. 10 above) may be used by a country that would otherwise be content with a product-based PPM, because it is impossible to ascertain how a particular product was made except through a generalisation about products from that country (or that producer). So far as the law of the WTO is concerned, such country-based restrictions will still require a

initially plausible to distinguish between country-based and product-based PPMs. For readers who disdain this sort of argument, we shall see that there are economic differences and other political economy differences as well. So, to reiterate, when I talk about PPMs I shall be talking about *product-based* PPMs unless the context clearly indicates otherwise.

Now, a second point about the scope of 'PPMs'. For most people, the paradigm case of a PPM is a regulation, in the narrow sense in which a 'regulation' is distinguished from a tax. Think of the *Tuna/Dolphin* cases or the *Shrimp/Turtle* case, or a hypothetical law excluding products produced by workers paid a sub-standard wage. But in connection with climate change, we may well be thinking about *taxes* that distinguish between products on the ground of the techniques used to produce them. In the discussion that follows, I shall generally not distinguish between PPMs that involve regulation in the narrow sense and PPMs that involve taxation. I shall use the word 'regulation' to encompass both cases, again unless the context indicates otherwise. It is true that the WTO agreements have distinct provisions for the two cases; but the underlying conceptual issues are the same. And I think the legal results under the best reading of the various provisions are essentially the same for regulations (narrow sense) and taxes. There is one distinctive issue in connection with taxes: who gets the revenue? The Border Tax Adjustment provisions seem to presuppose that the best, or natural, answer to that question is 'the country of consumption', under the 'destination principle'. But it is clear that both the drafters of the border tax provisions and the authors of the Border Tax Adjustment Report were focusing on taxes imposed primarily for fiscal reasons, as opposed to the regulatory (Pigovian) taxes we are thinking about in connection with climate change. That is one of the reasons the border tax provisions seem so ill suited to addressing the problem of emission-based PPMs. In fact, if emission-based PPMs appear, the system that includes them is very likely to end up giving the bulk of the revenue to the producing country — which seems perfectly acceptable. In any event, this is one of the many problems of detail that I shall ignore in this paper, in order to concentrate on more fundamental issues.

special demonstration of justification. This 'evidentiary' use of country of origin or producer identity is one of the many wrinkles I shall ignore in the remainder of this essay. I shall assume that any country-based PPM under discussion is *not* justified by this sort of evidentiary argument.

III. PPMs and comparative advantage

I have heard both distinguished international economists and distinguished trade lawyers say that PPMs interfere with the operation of comparative advantage. This claim is at best misleading, and at worst false. The problem is that the notion of comparative advantage is ambiguous between what I shall call ‘positive comparative advantage’ and ‘normative comparative advantage’. Consequently, the claim that PPMs interfere with the operation of comparative advantage is ambiguous also. I am prepared to concede for present purposes that PPMs always interfere with *positive* comparative advantage (although even this depends on how we define the alternative to the existence of the PPM). But the claim that PPMs interfere with positive comparative advantage, even if true, is no ground for objecting to PPMs. We would have a well-grounded objection to PPMs only if they interfered with *normative* comparative advantage. As to this, sometimes they do, but often they do not. Often a PPM is actually essential to the operation of normative comparative advantage, and hence to the achievement of efficiency.

So first, what is the difference between positive and normative comparative advantage? Let us start with the textbook example. England and Portugal both produce wine and cloth. In autarchy, the transformation rates of wine into cloth differ between the two countries. If we imagine that in each country we transfer the resources needed to produce a barrel of wine in that country from wine production to cloth production, we get more new cloth in England than in Portugal. If trade barriers are now removed, we will see English cloth traded for Portuguese wine and both countries will be better off. This is comparative advantage at work.

But notice that when we summarised the effect of removing trade barriers, we made two distinct claims: (1) English cloth will be traded for Portuguese wine, and (2) both countries will be better off. In the textbook example as we imagine it, and specifically with the implicit assumptions of no externalities and no regulation other than the initial trade barriers, these claims are both true; in this example they naturally go together. But in more complicated cases they can come apart.

Imagine two countries, Barataria and Pontevidro, both of which produce widgets and gadgets. In every physical, technological, and demographic respect, the economies are identical — the same climate, same resources, same technology, same sized populations with the same distribution of consumer preferences. The only technology for producing widgets generates greenhouse gases (in both countries, and to the same

extent in both countries, since technology is identical). Gadget production generates no greenhouse gases. Now, despite the identicalness of the economies in all the respects mentioned, there is one difference: in the legal system. Barataria imposes a tax on the emission of greenhouse gases that correctly internalises the global-warming externality, while Pontevidro has no such tax. Now, in autarchy, the relative price of widgets will be higher in Barataria than in Pontevidro. So, if we remove trade barriers, we will see Baratarian gadgets traded for Pontevidran widgets. But does this make both countries better off? No. It cannot be that both countries are better off, because the world is worse off. There is neither gain nor loss from the fact that a certain number of widgets that used to be produced in Barataria are now produced in Pontevidro and a certain number of gadgets that used to be produced in Pontevidro are now produced in Barataria, since the technologies (including external effects) are identical in both places. But, because Baratarian consumers now have access to lower-priced Pontevidran widgets, there is more widget production overall than there was in autarchy, and hence more global warming. There was already too much widget production in autarchy, since Pontevidro was generating greenhouse gases by producing widgets for itself without taking account of the cost. But now it is even worse, because, as noted, one of the effects of opening up trade will be an increase in widget production overall.¹³

What are we to say about comparative advantage in this example, where removing barriers creates trade, but that trade makes the world worse off? In order to describe what has happened in terms of the operation of comparative advantage, we must distinguish between 'positive comparative advantage' and 'normative comparative advantage'. 'Positive comparative advantage' is just a matter of actual relative prices in the two countries in autarchy (or before the removal of some particular trade barrier we are considering removing). Positive comparative advantage is what explains trade flows when barriers are removed. In the Barataria/Pontevidro example, Pontevidro has a positive comparative advantage in widget production because of its non-taxation of greenhouse gases. In contrast, 'normative comparative advantage' reflects real

¹³ The reader might wonder whether other benefits from trade could outweigh this disadvantage, but in this stylised example there are no genuine benefits from trade at all. If both countries properly internalised the cost of greenhouse gases (or for that matter, if neither did), then in autarchy the relative prices of widgets and gadgets would be the same in both countries, and opening up borders would have no effect. (I ignore possible externalities of scale.)

costs of production, including externalities, and it is this concept that tells us where production should be located for global efficiency. In the Barataria/Pontevidro example, even though Pontevidro has a positive comparative advantage in widget production as a result of ignoring greenhouse gases, it has no normative comparative advantage; there is no efficiency gain of any kind to be had from relocating production from what obtains in autarchy. To be sure, in our example there is also no *cost* from the mere relocation of production. The harm in our example when barriers are removed is not from the relocation of production, but from the overall increase in widget production. Still, in our example, where positive comparative advantage diverges from normative comparative advantage, allowing the trade flows called forth by positive comparative advantage is inefficient and reduces world welfare.

Our ultimate goal, remember, is to assess the claim that PPMs interfere with comparative advantage. Are we making any progress? In our Barataria/Pontevidro example as described so far, there is no PPM. The trade barriers in autarchy we assume take the form of across-the-board total embargoes on import or export; and once those barriers are removed, there are no barriers at all, therefore still no PPMs. But we can introduce a PPM. Let us imagine that, at the same time as the across-the-board embargoes are removed by both countries, Barataria imposes a tax on imports made by a production method that emits greenhouse gases, the tax being identical to Barataria's tax on domestic greenhouse gas emission. This is a PPM.¹⁴ Furthermore, this PPM plainly interferes with *positive* comparative advantage. With the PPM in force, we will see the same difference between the relative prices of widgets and gadgets in Barataria and Pontevidro that we saw in autarchy, because the PPM still blocks the trade flows that would eliminate this difference; removing the PPM (while leaving the domestic tax in place) would induce trade flows.¹⁵ But this PPM does not interfere with *normative* comparative advantage, because as we have seen, Pontevidro has no normative comparative advantage. The PPM merely puts Pontevidran and Baratarian

¹⁴ It may occur to the reader that in this particular example, Barataria could get the same effect by eliminating its tax on emission of greenhouse gases entirely and imposing an origin-neutral internal tax on the sale of widgets. But this observation in no way undermines the appropriateness of using the case where the tax takes the form of a domestic process tax and a PPM for thinking about the effects of PPMs.

¹⁵ If Barataria removed both the PPM and the internal tax, we would see no trade flows. Widget production would rise in Barataria and gadget production would fall, but after that adjustment, there would be no impetus to cross-border trade.

producers on the same footing. Removing the PPM would allow Pontevidran producers to exploit a positive difference between the legal systems of the countries, for which there is no normative justification. Removing the PPM would make the world worse off by inducing excessive widget production.

What is the upshot for the claim that PPMs interfere with comparative advantage? I am prepared to concede for present purposes that PPMs (assuming they bind at all) always interfere with positive comparative advantage.¹⁶ But our hypothetical case is a counter-example to the claim that PPMs always interfere with normative comparative advantage. In our hypothetical case, the PPM does not interfere with normative comparative advantage; in fact, it increases efficiency, or reduces inefficiency, by preventing over-production of widgets beyond what occurs in autarchy. It is only the stylisation of the hypothetical case that has made possible some of the precise claims about the positive and normative consequences of various regulatory regimes; but it should be obvious that the general point I am making extends much beyond such stylised cases.

Notice that my claim is *not* that PPMs *never* interfere with normative comparative advantage. Sometimes they do — and this is true even though I always assume that the substance of any PPM is applied to domestic production as well as imports. Let us look at an example where a PPM does interfere with normative comparative advantage. We have only to change our current example in two ways. First, we assume that instead of generating greenhouse gases, widget production causes noise in the neighbourhood of the factory. Second, we assume that Pontevidrans and Baratarians have just one difference in their preferences: Baratarians are very sensitive to noise, and Pontevidrans are very insensitive. Hence Barataria, but not Pontevidro, imposes a noise abatement tax on widget production. As before, in autarchy there will be a difference in relative prices in the two countries, and removing trade barriers will induce trade flows. But in this case, the trade flows will actually make the world better off. There is a noise externality from widget production in Barataria, which the noise abatement tax internalises. There is no corresponding noise externality from widget production in Pontevidro. There is the

¹⁶ This assumes that if we removed the PPM, we would leave all domestic regulation in place. If the alternative to the PPM is no PPM and the domestic tax or regulation is removed as well, then the change could move positive comparative advantage in either direction, or it could leave it unchanged. But discussion of positive effects in all cases is not my present concern.

same noise, but Pontevidrans do not mind it, so there is no externality. As a consequence, widgets really are relatively cheaper to produce in Pontevidro; the relocation of widget production to Pontevidro is a good thing, as is the increased global production of widgets that results once Baratarian consumers have access to Pontevidran widgets. In this case, if Barataria imposed a noise-based PPM that taxed on the basis of the noise level (the same as the domestic tax), it would interfere with Pontevidro's normative comparative advantage.

To summarise our conclusions thus far: The notion of 'comparative advantage' is ambiguous between positive and normative comparative advantage. Hence, the claim that PPMs interfere with comparative advantage is ambiguous between the claim that PPMs interfere with positive comparative advantage and the claim that PPMs interfere with normative comparative advantage. Even if PPMs always interfere with positive comparative advantage, that offers no ground for a general argument against PPMs, since interfering with positive comparative advantage is sometimes a good thing. In contrast, the claim that PPMs always interfere with normative comparative advantage would ground a general argument against PPMs, if it were true. But it is not.¹⁷

Lest the reader worry about my larger intentions, I am not recommending that the Appellate Body try to formulate all WTO law on the principle of normative comparative advantage. The task of the Appellate Body is to interpret a treaty; some parts of that treaty make sense as attempts to facilitate the operation of normative comparative advantage, and some do not. I am suggesting that when the Appellate Body is interpreting textual language that is in some respect unclear, but the basic object of which seems to be to encourage efficient regulation (as in Articles I, II, III, XI, and XX of the GATT, and the corresponding articles of the GATS, and the Agreement on the Application of Sanitary and

¹⁷ It might be suggested that we can argue against PPMs in general on the grounds that *most* PPMs interfere with normative comparative advantage, and it is too much trouble, or too difficult, to distinguish between good PPMs and bad ones. So we ban them all. I am sceptical of both of the premises of this argument, but I shall not pursue the argument in this form. We should be extremely reluctant to condemn PPMs across the board if PPMs might be of significant help in addressing one of the greatest problems the world faces, namely global warming. If need be, I would separate out PPMs dealing with greenhouse gases and other climate related issues as a special category and, without regard to how we treat other PPMs, worry specifically about whether these climate related PPMs interfere with normative comparative advantage, and how we can tell, even if that requires investing more effort into making the required distinctions than would be worthwhile in connection with other PPMs. But I am not persuaded that is necessary.

Phytosanitary Measures (SPS) and TBT), then we would hope the Appellate Body would be influenced in its interpretation by correct views on how certain sorts of measure are connected in principle to efficiency. I should also say that I am not offering here a complete theory of normative comparative advantage. My reasons for not doing so are connected to the existence of the deep puzzles I mentioned earlier about the justification of the most-favoured-nation principle. I hope that the claims about normative comparative advantage that I have made in connection with particular examples can be accepted on their own, without a comprehensive theory.

Before going on, let me make some remarks about the 'level playing field' metaphor and about the use of the word 'distortion'. A standard argument against PPMs is that they interfere with comparative advantage, and I have explained why that is a misleading over-generalisation. A standard argument *in favour of* PPMs is that they are required to 'level the playing field' on which domestic and foreign producers compete. This is a precisely complementary and equally misleading over-generalisation. (Ironically, since many people see the fallacy in this argument *for* PPMs, that may encourage the overbroad rejection of PPMs.) Sometimes we should 'level the playing field', specifically when the disfavoured process creates the same externality when used in the foreign country that it creates when used at home (as in our greenhouse gas emission case). In this case, correcting for the externality in connection with domestic but not foreign production is both inefficient and 'unfair' to domestic producers. In contrast, if the disfavoured process does not create the same externality when used in the foreign country as it creates when used at home (as in the noise abatement case), then the playing field should not be levelled. Production ought to occur where it generates less social cost, and 'levelling the playing field' with a PPM will interfere with that. Nor is it 'unfair' to domestic producers that they should be charged for a social cost they impose, while their foreign competitors using the same process are not similarly charged because in context they do not impose a similar cost. In sum, we should 'level the playing field' precisely when a PPM does *not* interfere with the operation of normative comparative advantage but rather facilitates it; and we should *not* 'level the playing field' when a PPM *would* interfere with the operation of normative comparative advantage. Complementary overgeneralisations, as I said.

As to 'distortion', all that needs to be done is to point out that it is ambiguous in the same way as 'comparative advantage'. When it is

claimed that a measure 'distorts' trade, it is natural to take this as a normative claim that the measure interferes with efficiency and is therefore bad; 'distort' in ordinary speech carries a negative normative connotation. But all too often people claim some measure distorts trade simply on the ground that it alters trade flows. This positive claim, even if true, does not entail any normative claim of inefficiency. Unfortunately, it strongly connotes such a claim; and I think people who speak carelessly about distortion often mislead not only their audience but themselves.

IV. PPMs, externalities, and 'coercion'

Let us now press forward again with the discussion of PPMs and comparative advantage. (Hereafter, by 'comparative advantage', I shall mean *normative* comparative advantage unless the context indicates otherwise.) The lesson we learn from comparing the greenhouse gas example with the noise abatement example is that, at least in this sort of case, whether a PPM interferes with the operation of comparative advantage or supports it depends on whether the targeted process creates an externality when it is used in the exporting country. This raises the question of what counts as an externality. I assume most of my readers would agree that greenhouse gas emission is an externality, whether the emitting country cares about the climate consequences (or even welcomes them) or not, but perhaps I am over-optimistic. In any event, it will be conducive to our general understanding if we consider briefly the question of the status of PPMs when there is disagreement, even reasonable disagreement, about the significance of the 'external' effects of the targeted process.

Take the case of tuna fishing using methods that kill dolphins. I assume the relevant species of dolphin is not endangered. Aside from the question of species preservation, some countries, such as the United States, regard it as morally offensive to kill such intelligent animals. They want the dolphins to live. Some countries (let us say Pontevidro again, to remain hypothetical) have no such feelings about dolphins. Suppose the United States enacts a law forbidding its domestic tuna fleet from using certain methods particularly dangerous to dolphins; and suppose it then adopts a PPM that excludes imports of tuna from other countries unless it has been fished by methods as dolphin friendly as those allowed US fishermen. Is this PPM defensible on my earlier analysis or not? Does the use of dolphin-unfriendly fishing techniques by the Pontevidran fleet impose an externality?

I have heard people argue that because of the disagreement about the importance of not killing dolphins, we cannot say on any objective grounds whether there is an externality here. (There is no disagreement, I assume, about what fishing methods kill dolphins at what rate. The disagreement is about whether that matters.) I have heard other people argue that there is definitely *not* an externality from dolphin-unfriendly fishing by the Pontevídran fleet, because *Pontevídro* does not value dolphins. Both of these claims are wrong. There is an externality here, in the sense that is relevant to thinking about efficiency. If the killing of dolphins by Pontevídran fishermen makes Americans unhappy, that is a genuine cost of such killing, and it is one the Pontevídran fishermen do not take into account. If this cost is not somehow internalised, Pontevídran fishermen will kill more dolphins than is efficient. That there is an externality here is simply not subject to doubt.

But notice I have said nothing as yet about how the cost to American sensibilities should be internalised. I think many people resist the claim that there is an externality in this case because they have in the back of their minds the ‘polluter pays principle’, or a broader analogous principle that says the ‘active agent’ causing an externality should pay, or be stopped, or at least be discouraged. But of course, the cost could equally be internalised if the United States offered to pay Pontevídran fishermen for not killing dolphins. And if we imagine for the moment that the US view about dolphins is thoroughly idiosyncratic, it may well seem that fairness requires that the cost should be internalised by the United States bribing *Pontevídro* to stop killing dolphins (or providing them with dolphin-safe technology, or whatever), rather than by *Pontevídro* being coerced by a PPM to stop killing them.

There is something in this claim that the United States should pay; but it should not seem completely right either. The specific measure the United States is proposing amounts to no more than a refusal to buy tuna that has been fished at the expense of dolphins’ lives. Such a refusal to buy is not normally seen as ‘coercion’. If I decide to switch from my old lawn-mowing service to a new one because the new one uses ethanol from sugar as a fuel for its mowers, I am not ‘coercing’ my old service to change their fuel, not even if I am such an important customer that they do in fact change their fuel to keep my business. A decision not to buy what one does not want is not ‘coercion’ of the seller; it is part of the normal operation of a market economy. And the United States imposing a PPM (*product-based*, remember) on Pontevídran tuna is just an instance of a consumer (now a ‘collective’ consumer) not buying what

he (or it) does not want. For the reader who is troubled by this reference to a 'collective' consumer, I shall say more about that in a moment. But first, notice how limited, at least formally speaking, is the effect on Pontevidran fishermen of the US decision not to buy.

There is a great deal of Pontevidro's behaviour that the United States cannot hope to touch by a (product-based) PPM — for example, Pontevidro's catching some tuna by dolphin-unfriendly methods and exporting that tuna to third countries that do not care about dolphins. Even this behaviour imposes an externality on the United States. Again, that there is an externality should be uncontroversial. But even though there is an externality, we are not at all inclined to appeal to the notion that the active agent behind the externality should be made to stop, given our assumption that the US position is idiosyncratic. Rather, this is a case where we think the United States should get relief only if it is willing to pay Pontevidro to change its ways. But even if the United States should have to pay Pontevidro if it wants to change the way Pontevidro catches tuna for third-country markets (or its home market), it still seems that the United States should be free to refuse to buy *for itself* a product (dolphin-unfriendly tuna) that it does not want. This is not 'active agent pays', which is unacceptable as a general principle in the present circumstances. This, as I have said, is just the operation of the market.

Returning now to the 'collective consumer' issue, there are two differences that may seem significant between the US regulation on tuna and my decision about the lawn-mowing service. First, the United States definitely is coercing those consumers in the United States who do not care about dolphins and would like to buy cheaper tuna. But governments coerce their own citizens all the time; and they are justified in coercing them to prevent them from imposing externalities on their fellow citizens, as dolphin-indifferent consumers of tuna do on their fellow citizens who like dolphins (because purchases of dolphin-unfriendly tuna encourage dolphin mortality).¹⁸ There may be some limits to this 'externality-preventing' justification; there may be some individual behaviour that a government is not justified in preventing solely on the ground that it makes others unhappy. But consuming dolphin-unfriendly tuna is not such behaviour. This is paradigmatically the sort of case where a government can regulate behaviour on pure

¹⁸ When dolphin-unfriendly tuna is purchased, then in the normal course of events, the retailer, wholesaler, distributor, and importer will resupply along the same supply chain, which means more dolphin-unfriendly tuna will be fished.

preference-maximising grounds. So this *internal* coercion is not a problem. And as to the Pontevidran fishermen, there is no coercion at all, merely the United States announcing what sort of tuna it wants to buy once all affected domestic interests are brought to bear on the consumption decision.¹⁹

Second, we might worry that the United States as a huge collective consumer has a degree of market power that an individual consumer almost never has, and that its ban on dolphin-unfriendly tuna may constitute exploitation of that market power. But we need to exercise the same kind of care in connection with the word 'exploitation' that I have already discussed in connection with 'comparative advantage' and 'distortion'. The United States is a huge presence in international trade. Consequently, a US PPM on tuna is likely to have a significant effect on foreign tuna fishermen, who may face a choice between changing their technology, which they may not have the capital to do, or losing market share. But we should not call this 'exploitation' of the US market power, which has a strong normative connotation of disapproval, unless it leads to inefficiency. Even if we think decency requires the United States to provide assistance to Pontevidran fishermen if they are in fact too poor to invest on their own in new fishing technology (the cost of which would presumably be mostly recouped in higher prices), still that is a matter of the particular circumstances of these fishermen. It is not a consequence of any general principles concerning the use of PPMs, principles which must govern relations between countries of all different relative sizes and

¹⁹ The references in the text to preference maximisation and considering all affected domestic interests might seem to suggest that the US Government ought to consider the preferences of not only its own citizens, but also the Pontevidran fishermen. But as I have explained elsewhere, when the effects on Pontevidrans are market mediated, as they are here (that is, when the effects flow only from the terms on which someone is willing to engage in a market transaction with the Pontevidrans), efficiency does not require that they be considered by the United States. Donald Regan, 'What are trade agreements for? — two conflicting stories told by economists, with a lesson for lawyers', *Journal of International Economic Law* 9 (2006), 951–88. Remember the lawn-service example. Efficiency does not require that when I decide on what lawn service to use, I consider the interests of the lawn-service owners. Rather, I consult my own interests in deciding what I want to buy at what price; they consult their interests in deciding what to offer at what price; and (in the absence of monopolistic or monopsonistic behaviour) efficiency results. Notice that the external effects *within* the United States — the effect of Jones's purchase of dolphin-unfriendly tuna on Smith's sensibilities — are not market mediated. They flow from Jones's market behaviour, but as between Jones and Smith, they flow without any market relationship between them. That is why government intervention is required to achieve efficiency.

developmental levels. The claim that *in general* the user of a PPM should compensate affected exporters for their loss has no more moral or economic justification than Saudi Arabia's claim that it should be compensated if the other countries of the world succeed in reducing their demand for oil.

With regard to the question of whether the US PPM, in conjunction with the US market power, actually does lead to inefficiency, the answer is, 'No, not unless the United States is *purposefully* aiming at effects that it can achieve only because of its market power.' The full purport of that answer will hardly be immediately obvious; I have explained it and justified it at length elsewhere.²⁰ The crucial points for now are: (1) the mere fact that the US behaviour has certain *effects* because of the US market power that it would not have otherwise is *not* enough to cause inefficiency or to justify us in complaining of exploitation of market power; and (2) in the thumbnail sketch of the US motives for the PPM that I have given, there is nothing to suggest exploitation of market power or inefficiency (nor would there be even if the PPM were partly consciously motivated by a desire to 'level the playing field' for US fishermen, provided the concern for dolphins is genuine).

Perhaps a thought experiment will make it more intuitive that the PPM does not exploit the US market power. The reason we need a PPM (specifically, a PPM that goes beyond the provision of information to consumers) is that the class of people who consume tuna and the class of people who care about dolphins are not the same. Imagine for the moment that we hold the overall national profile of preferences over tuna prices and dolphin mortality constant, but we redistribute some of the preferences between individuals, so that the people who eat tuna and the people who care about dolphins are now the same. Now, assuming consumers have the means to distinguish dolphin-friendly tuna from dolphin-unfriendly tuna, we would see no purchases of dolphin-unfriendly tuna, even without any government regulation. But no one could claim that the purely private choices of all these consumers to reject dolphin-unfriendly tuna would count as the exploitation of market power or would create inefficiency. Returning now to the world of preferences as they are actually distributed, the function of the PPM in this world is simply to bring all relevant domestic preferences to bear on choices about tuna, just as happens in our imagined world of redistributed preferences without government intervention. So the PPM in the actual world is not exploitive either.

²⁰ *Ibid.*

Changing the topic somewhat, there is another reason PPMs are often thought of as 'coercive'. They are often assumed to be aimed at altering exporting countries' internal policies regarding production, a goal which is suspect. Now, it is true that PPMs *may* be aimed at altering other countries' internal policies. But this is not a necessary feature — certainly not of product-based PPMs, and in fact not even of country-based PPMs. With regard to product-based PPMs, the United States could quite sensibly maintain its ban on dolphin-hostile tuna even it were perfectly clear that Pontevidro would not change its national policy in response to the PPM, and in fact that no individual Pontevidran fisherman would change his behaviour. The United States might like to see such changes, but if it knows they are not going to happen, then bringing them about cannot be a part of its goal. Its goal, still fully adequate to explain the PPM, is just to minimise the demand for (and thus the production of) dolphin-hostile tuna, and perhaps also to avoid its own complicity in dolphin mortality.

The case might seem to be different with regard to country-based PPMs, since the importer may now exclude some shipments of dolphin-friendly tuna originating in the non-complying country. But even this might be justified (even if it is known that Pontevidro will not change its policy) as a means of reducing overall demand for dolphin-hostile tuna. Purchases by the United States of dolphin-friendly Pontevidran tuna might still increase the fishing of dolphin-hostile tuna if Pontevidran fishermen redirect to the US market dolphin-friendly tuna that they would have caught anyway and sold to dolphin-indifferent consumers, and if they then replace the redirected quantity with newly caught dolphin-hostile tuna. Once we start down this road, we will eventually realise that even the United States consuming its own fishermen's dolphin-friendly tuna may have the ultimate consequence that more tuna is taken by dolphin-hostile methods by fishermen of other countries. But it would be a mistake to treat the US failure to go all the way to the end of this line (which may also not be necessary, depending on the economic facts) as definitively revealing that a country-based PPM must be in bad faith (that is, must have a coercive or protectionist purpose). There are good reasons to be more suspicious of country-based PPMs than of product-based PPMs, but that is not to say that country-based PPMs are necessarily aimed at changing exporting countries' policies, nor that they are always illegal.

It seems possible that one of the reasons the Appellate Body's opinion in *US — Shrimp* was so unpopular is that the Appellate Body seemed willing to uphold some PPMs despite regarding all PPMs as intrinsically coercive. To my mind, it is not at all clear what the Appellate Body is

actually saying about a whole tangle of issues concerning coerciveness, the purpose behind PPMs, and the relevance of the distinction between country-based and product-based PPMs (specifically, whether it was essential to the legality of the revised US PPM that it provided for shipment-by-shipment certification of shrimp from non-certified countries). I do not have space here for anything like a complete discussion. But in paragraph 161 and paragraph 165 the Appellate Body makes it very clear that it regards the unrevised PPM as coercive (it refers in paragraph 161 to the measure's 'intended and actual coercive effect', and it says in paragraph 165 that the measure is 'concerned with effectively influencing' other members' policies). And yet, the Appellate Body seems to object not to the coerciveness in itself, but to the particular goal of making other countries adopt turtle protection programmes identical to that of the United States, even where such measures were not necessary. And back in paragraph 121, the Appellate Body had said that 'conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX'.

Now, 'conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy' is not logically equivalent to trying to coerce them into adopting that policy; as we have noted, the importing Member might impose the condition on imports even though it knows no change in the exporting member's policy will result. But in conjunction with the later discussion that finds coercion in the US measure, it almost seems as if the Appellate Body is saying coercion is a common aspect of all measures falling within Article XX of the GATT.

The water is further muddled by the fact that it is not even true that conditioning access on the exporting member's policy is a common element of all measures that fall within Article XX (not even if we include cases where the conditioning does not amount to coercion). The measure by France in *Asbestos* that the Appellate Body upheld under Article XX (after also finding that it did not violate Article III) said nothing about Canada's policies.²¹ It merely excluded asbestos and asbestos products, without regard to the country of origin or that country's policies.

²¹ EC — *Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (adopted 5 April 2001).

The Appellate Body's seeming desire to defend coercion may reflect the tendency of exporting members to complain that any measure that excludes any of their products is 'coercive'. The Appellate Body is right, of course, that on this understanding of 'coercion' many coercive measures will pass Article XX. Indeed, on this understanding, many coercive measures should never even get to Article XX, because they will pass review under Article III. But this is not a reasonable understanding of 'coercion'. The Appellate Body should not indulge it or encourage it.

Given the general confusion about PPMs, the Appellate Body should not write opinions that reinforce the view that all PPMs are coercive, or that PPMs have any special affinity with coercion.

V. Three fragments of legal analysis

As noted above, I do not propose to go step by step through all possible lines of legal analysis of emission-based import restrictions; for the most part, that would merely repeat what others have said. I do want to make three quick points that I do not think duplicate what can be found elsewhere. All three points concern the question of whether PPMs violate the primary prohibitory provisions of the GATT, in particular Articles II and III. Of course, even if PPMs do violate the primary prohibitory provisions, they may be justified under Article XX of the GATT, like the import restriction in *Shrimp*. Some people think the Article XX issues are the only ones worth discussing, on the grounds that the Appellate Body will always find a PPM in violation of some primary prohibitory provision. But I shall say nothing here about Article XX; even if it ends up being the crucial provision, the basic framework for legal analysis under Article XX is reasonably clear.²² Also, I am not persuaded that Article XX is the only provision in play. That PPMs are always *prima facie* illegal is certainly the conventional wisdom. But then, it was conventional wisdom before *Shrimp* that PPMs were not only *prima facie* illegal, but also unconditionally unjustifiable under Article XX. That conventional wisdom was overthrown in *Shrimp* when the Appellate Body simply applied

²² What is clear is the *framework*. There will be excruciatingly difficult questions about the application to the facts of particular ideas: whether the restrictions on domestic and foreign production are comparable in the way that Article XX(g) implicitly requires, or whether some measure is 'unjustifiable discrimination', and in particular, how to apply in a very different context the basic idea of *Shrimp* that a measure must not require technology that is unnecessary in the exporter's circumstances. But to my mind there is little to be said about these issues until we have a concrete measure before us.

the treaty language. Since I think the treaty language also indicates that some PPMs are not even *prima facie* illegal, I have hopes that the Appellate Body may eventually confirm that as well. (Notice the Appellate Body has not yet considered a *product-based* PPM under Article II or III.) Since respondent members will obviously prefer to have their PPMs upheld at this very first stage, for burden of proof reasons if no others, the possibility is worth discussing. Along with Rob Howse, I have argued elsewhere that PPMs (*product-based* PPMs, remember) do not automatically violate Article III.²³ I shall not repeat what I have said already. These three new ‘fragments’ of legal analysis can be fitted into the general scheme Howse and I have developed.

Fragment (1): a hypothetical case

Here I simply want to describe a hypothetical PPM that it seems to me we *must* conclude does not violate Article III; it cannot be justified under Article XX, because of the closed list of purposes, and yet it seems to me inconceivable that the drafters of the GATT would have wanted to forbid it. Here is the scenario: Home has an industry that produces widgets by a process that emits noxious odours affecting a substantial region around the factories. Home does not import widgets. As a result of political organisation by residents of the area around the widget plants, Home adopts a regulation forbidding the use of the odour-emitting process for widget production, and the producers switch to a more expensive, but less offensive process. At this point it becomes possible for foreign widget producers, who still use the cheaper, odour-emitting process, to export widgets to Home. As it happens, Foreign’s widget factories are right on the Home/Foreign border; and it even happens that prevailing winds are such that the odour from the Foreign plants affects only residents of Home. So the residents of the border region combine with Home widget producers to secure a PPM, forbidding the sale in Home of widgets made with the odour-emitting process.

Now, I cannot believe that the drafters of the GATT would have wanted to forbid this PPM. It is both efficient and fair: the Foreign widget producers are generating an externality in Home; they have no *normative* comparative advantage over Home widget producers; the history of the

²³ R. Howse and D. Regan, ‘The product/process distinction — an illusory basis for disciplining “unilateralism” in trade policy’, *European Journal of International Law* 11 (2000), 249–89.

PPM makes it clear that Home's concern with the odour is not a mere excuse for protectionism; and all Home is doing is trying to avoid causing harm to itself by its own widget purchases. But is this PPM allowed by the GATT as it stands? If we take the legal issues out of order and ask whether this PPM can be justified under Article XX, it seems very doubtful that it can. There are no known health effects (on humans, animals, or plants) associated with the odours. The only way to bring this within Article XX would be to find that 'odour-free air' is an exhaustible natural resource. But if we add the plausible assumption that the odour dissipates entirely within twenty-four hours if the source is not continuously renewed, then to say this PPM was protecting an 'exhaustible natural resource' would be to give up completely on 'ordinary meaning in context'. It would make a mockery of the specific listing in Article XX. Much better to say that the PPM does not violate Article III (which is the relevant provision, because of the Note *Ad III*) in the first place. After all, this PPM has nothing to do with protectionism, which is what Article III is aimed at. In sum, we cannot plausibly claim that PPMs always violate Article III. This case is a counter-example.

Fragment (2): the relevance of regulatory purpose

Here I may be cheating a bit. I have said a great deal elsewhere about the role of regulatory purpose under Article III of the GATT.²⁴ But I have not done so since the Appellate Body decided *Dominican Republic — Cigarettes*,²⁵ and in any event there are always new readers. Once we have decided that PPMs do not automatically violate Article III, it is inevitable that the issue will arise, in connection with PPMs, of the relevance of regulatory purpose. The conventional wisdom is that the Appellate Body has definitively rejected consideration of regulatory purpose. But the conventional wisdom is wrong, not just about the best reading of the treaty, but about what the Appellate Body has actually done. So, very briefly:

²⁴ D. Regan, 'Regulatory purpose and "like products" in Article III:4 of the GATT (with additional remarks on Article III:2)', *Journal of World Trade* 36 (2002), 443–78, and 'Further thoughts on the role of regulatory purpose under Article III of the General Agreement on Tariffs and Trade — a tribute to Bob Hudec', *Journal of World Trade* 37 (2003), 737–60.

²⁵ *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (adopted 19 May 2005).

It is unfortunate that the two 'leading' cases about Article III are *Japan — Alcohol*²⁶ and *EC — Asbestos*.²⁷ Both cases tend to mislead readers about the Appellate Body's actual views and behaviour. (The focus on these cases is understandable, because of the timing of *Japan* and the anticipation that preceded *Asbestos*, but it is still unfortunate.) In *Japan — Alcohol*, the Appellate Body denied any interest in the subjective intentions of legislators, and people took this to mean that the Appellate Body was denying the relevance of regulatory purpose. But in *Chile — Alcohol*, which people somehow read without actually noticing what it says, the Appellate Body says explicitly, and more than once, that consideration of regulatory purpose is essential.²⁸ Indeed, it says *explicitly* that ascertaining regulatory purpose was the *precise point* of looking at the 'design, architecture, and structure' of the measure in *Japan*.²⁹ On the issue of regulatory purpose, *Chile* plainly overturns the conventional wisdom about *Japan*. It does not overturn *Japan*, since *Japan* never denied the relevance of purpose in the first place.

With regard to *Asbestos*, the Appellate Body seems to imply that regulatory purpose is not relevant to 'likeness' by its focus on the criteria in the Border Tax Adjustment Report, especially consumer preferences. But in finding asbestos and PCG fibres unlike, the Appellate Body is so bizarrely indifferent to the actual facts of consumers' revealed preferences that one wonders how seriously to take their analysis. In any event, they emphasise in the Delphic paragraph 100 that a finding of likeness is not the end of the matter, and they at least leave room for regulatory purpose to be relevant to the issue of 'less favourable treatment' for foreign goods. They say that there is less favourable treatment only if the 'group' of like imported products is treated less favourably than the 'group' of like domestic products. To my mind, the most plausible reading of this, although not the only one, is that there is less favourable treatment only if foreign products are disfavoured *because they are*

²⁶ *Japan — Taxes on Alcoholic Beverages*, WT/DS8 & DS10 & DS11/AB/R (adopted 1 November 1996).

²⁷ *EC — Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (adopted 5 April 2001).

²⁸ *Chile — Taxes on Alcoholic Beverages*, WT/DS87 & DS110/AB/R (adopted 12 January 2000), paragraphs 62, 71.

²⁹ *Ibid.*, paragraph 71. The reader may remember that the *Chile* report talks about ascertaining 'objective' purpose; lest one think this means the Appellate Body will look at nothing but the face of the measure, elsewhere in the *Chile* opinion, the Appellate Body considers Chile's proffered non-protectionist explanations for its tax scheme, although it finds none of them persuasive.

foreign. And then in *DR — Cigarettes*, they come even closer to asserting explicitly the relevance of regulatory purpose: '[T]he existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case.'³⁰ This is not quite an explicit endorsement of consideration of purpose, but the only way to make sense of the reference to 'explanation' is in terms of regulatory purpose.³¹ Certainly this statement gives the lie to any claim that consideration of purpose has been definitively excluded.

Fragment (3): avoiding border tax issues

Although much ink has been spilled about how emissions-based taxes would fare under the border tax provisions of the GATT, in particular Article II.2(a), it seems to me we may be able to sidestep II:2(a) entirely. The Note *Ad III* has been most often discussed in connection with regulations and the relation between Articles III and XI, but it applies also to taxes and charges, and thus to the relation between Articles III and II; it is a 'border tax adjustment' principle in itself. Suppose we consider a measure that says in more precise terms something like: 'No widget may be sold, used, or consumed in this country unless taxes have been paid [to any government, here or abroad] [or other payments have been made to purchase emission permits] in connection with its production [and not remitted] that reflect the carbon emissions in its production history.' It is not entirely clear whether this is a regulation or a tax; perhaps it is a regulation in respect of widgets on which the relevant taxes have been previously paid, and a tax in respect of widgets on which they have not. But insofar as it is a tax, it seems to be a tax that 'applies to the product' (the relevant language of the Note *Ad III*), even though the amount payable depends on earlier taxes levied during the production process. So the tax should be reviewed under Article III. This avoids entirely the issues under Article II:2(a) concerning what counts as 'an article from which the imported product has been manufactured or produced in

³⁰ *DR — Cigarettes*, n. 25 above, paragraph 96.

³¹ If we knew nothing of the jurisprudential context, we might take this quote from *Cigarettes* as saying that only origin-specific regulation is illegal under Article III. But we know that cannot be what it means.

whole or in part'. It might be suggested that this reading of the Note *Ad III* renders Article II.2(a) inutile. I have no space here for a full discussion, but here are two quick responses. First, we should be cautious with arguments from inutility, remembering that some redundancy is both inevitable and even desirable in most legislation. Second, Article II.2(a) retains a distinct function, even given the suggested reading of the Note *Ad III*, in authorising taxes in a *form* that would otherwise be unacceptable; in particular, a tax levied on imported gadgets at the border that compensates for an internal tax on some input physically incorporated into the imported gadgets, where there is no internal tax on gadgets themselves at all.

VI. Conclusion

Climate change is one of the most pressing, but also one of the most divisive, problems facing the world today. It is hardly surprising that it should threaten to create very divisive problems in the WTO. It is sometimes suggested that allowing unilateral emissions-based import restrictions might cause the collapse of the world trading system. And so it might. The converse possibility is not so often mentioned, but it also seems to me possible that, unless we achieve some multilateral solution to the climate change problem, trying to *forbid* unilateral emissions-based import restrictions might also cause the collapse of the world trading system. A country that is doing its part to reduce emissions will not be content to purchase high-emissions products from countries that are not doing their part, thus damaging both its producers and the climate. If its import restrictions are held to be WTO illegal, it may be unwilling either to change its regulations or simply to swallow the sanctions, as the EU was willing to do for a time in connection with *Hormones*. If the trading system is endangered either way — and I fear it may be — trying to figure out the 'right' legal solution to the PPM problem may be a waste of time in this context. We must have a multilateral climate agreement. But just in case it matters, I have tried to make it more likely that readers will think clearly about PPMs and get the right answers to the legal questions.